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December 8, 2004

EX PARTE

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Re: Unbundled Access to Network Elements; WC Docket No. 04-313

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; CC Docket No. 01-338

Dear Ms. Dortch:

On behalf of ACN Communication Services, Inc, we are writing to summarize our views in regard to the above captioned proceedings. We understand that the Commission is currently considering a draft order in the Triennial Review Remand proceeding, and reports are circulating that the draft order finds no impairment for local switching and, moreover, that current users of unbundled switching will have no more than six months in which to transition to other means of providing their services. ACN is disappointed to hear of the impending end to unbundled switching, especially since there appears to be no allowance for the particular needs of residential subscribers and those in low density areas who are not currently well-served by competition. More disturbing, however, are the reports of an unrealistically short six month transition period. The Commission has stated that it is only addressing the issues raised by the DC Circuit Court in the *USTA II* decision. If that is the case then, the original 27 month transition period provided in the *Triennial Review Order* should stand. Please be assured that any period of less than a year will prove catastrophic to a significant portion of the industry.

ACN's ability to weather any transition period will depend primarily on four factors:

1. Ability of the ILECs to perform hot cuts. Various parties have commented that there are doubts regarding the ILECs' ability to perform hot cuts in the quantities and at the pace that will be required during a transition period. Obviously, the shorter the transition the period, the higher the concentration of hot cut requests in a given period of time. The Commission must therefore establish a transition period that can accommodate the expected volume of hot cuts. (Of course, too short a transition period will obviate the need for any hot cuts at all; without sufficient time to prepare, current providers will simply be forced to exit the market.

2. The pace of technical advancements, particularly in regard to softswitch technology. As it explained in its comments, ACN is anxious to migrate away from its dependence on ILEC provisioned switching, regardless of whether it is forced to or not. However, it is uneconomical, inefficient and inimical to the Commission's goals for any new entrant to duplicate the existing networks just at the time that they are being driven to obsolescence by broadband technologies. ACN has diligently explored these options over the last year. The potential for broadband based local services is great, but it still only a potential. Without a reasonable transition period, competitors like ACN will not be able to manage the leap from the past to the future.

3. Organizational issues. Retooling to be a facilities-based provider cannot be done overnight. CLECs need to order and install new equipment (some with lead-times of many months), staff network operations divisions, and revamp operations support systems. Even if ACN were to begin this process on the issue date of the applicable order, it is unrealistic to assume that it could convert a single line to facilities-based service in six months, let alone all 175,000 that it serves. Without a reasonable transition period, competitors like ACN cannot migrate without losing most of their customer base in the meantime.

4. Reasonableness of wholesale agreements. Finally, one of the most significant factors in a transition to facilities-based service will be the extent to which competitors can conduct a viable business with services provided under the terms, conditions and rates of wholesale agreements in lieu of interconnection agreements pursuant to Section 251. To the extent that these agreements are fair and reasonable, CLECs can manage a conversion of their services from TELRIC based elements, and so will be able to migrate to facilities-based service while operating under a wholesale agreement, rather than a prolonged transition period. However, to the extent that the unreasonable terms are dictated by ILECs, CLECs will need a longer transition period at TELRIC rates in order to survive the migration to facilities-based service. Again, the Commission should only address the issues raised by the DC Circuit Court in the *USTA II* decision, and ACN recommends that the original 27 month transition period cited *Triennial Review Order* should stand.

Of the four factors described above, only one is within the control of the Commission. In establishing a transition period, the Commission should be cognizant of hot cut processes, technological advancements and organizational issues. However, there is little it can do to influence them. On the other hand, the Commission can, and should, significantly influence the quality of wholesale agreements. These agreements are commonly referred to as "commercial" agreements or "market-based rate" agreements, but the Commission should be aware that these labels are spin that obscures rather than illuminates their actual nature. With the exception of its discussions with Qwest, ACN had found the ILEC proposals to be neither commercial nor market-based.

"Commercial" is a handy but ultimately vague label that would seem to connote an agreement between equals to conduct mutually beneficial commerce, but ACN has inferred that, in ILEC usage, it really means "not subject to regulatory oversight." "Market based rate" connotes a perfectly competitive market for some standard commodity that is auctioned in an

open forum among numerous buyers and sellers, in which no supplier dominates the market enough to have any individual effect on market price. However, this situation clearly does not exist by any stretch of the imagination.

Instead, the market for network elements is, at best, an oligopoly dominated by one entrenched provider with control of a critical resource that CLECs like ACN have come to rely on and which is essential, at least for the immediate future, to ACN's continued existence as a going concern. Considering the bargaining power and resources of the ILECs, CLECs are hopelessly overmatched in their negotiations, and will continue to be, without the benefit regulatory "muscle." ACN believes that the Commission's most effective tool is Section 271 of the Act.

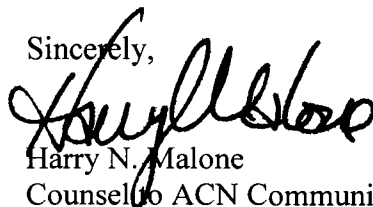
The Commission has already determined that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling. Even where a checklist item is no longer subject to section 251 pricing standards, the pricing of such items is still governed by the "just and reasonable" standard established under sections 201 and 202,¹ a conclusion not gainsaid by the D.C. Circuit. In order to protect the interests of all who rely on the pro-competitive goals of Act – consumers and competitors alike – the Commission must ensure that the BOCs are held to the obligations they undertook when they were granted in-region long distance authority.

The obligations of sections 201, 202 and 271 must be the underpinnings of all wholesale agreements. In fact, ACN suggests that the Commission renounce the terms "commercial agreement" or "market-based agreement" in favor of a more appropriate label: Section 271 agreements. In this way, the Commission can equip CLECs with the tools that they need to help balance the interests of all actors in the industry, for the benefit of consumers.

We realize that, while Section 271 obligations are a subject of the current NPRM, more urgent issues prevent them from being on the current agenda. However, we ask the commissioners to be aware of them during their deliberations, since the application of Section 271 will have a decisive effect on the future success or failure of any decisions made in the next few weeks.

Pursuant to the Commission's rules, this letter is being filed electronically in the above captioned dockets.

Sincerely,

A handwritten signature in black ink, appearing to read "Harry N. Malone", is written over the typed name and title.

Harry N. Malone
Counsel to ACN Communication Services, Inc.

¹ *Triennial Review Order* para. 7.

Ms. Dortch
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cc: Chairman Powell
Commissioner Abernathy
Commissioner Copps
Commissioner Adelstein
Commissioner Martin
Scott Bergman
Matt Brill
Aaron Goldberger
Dan Gonazalez
Chris Libertelli
Jessica Rosenworcel
John Tassone, ACN